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No. 995

In the Supreme Court of the United States

OCTOBER TERM, 1946

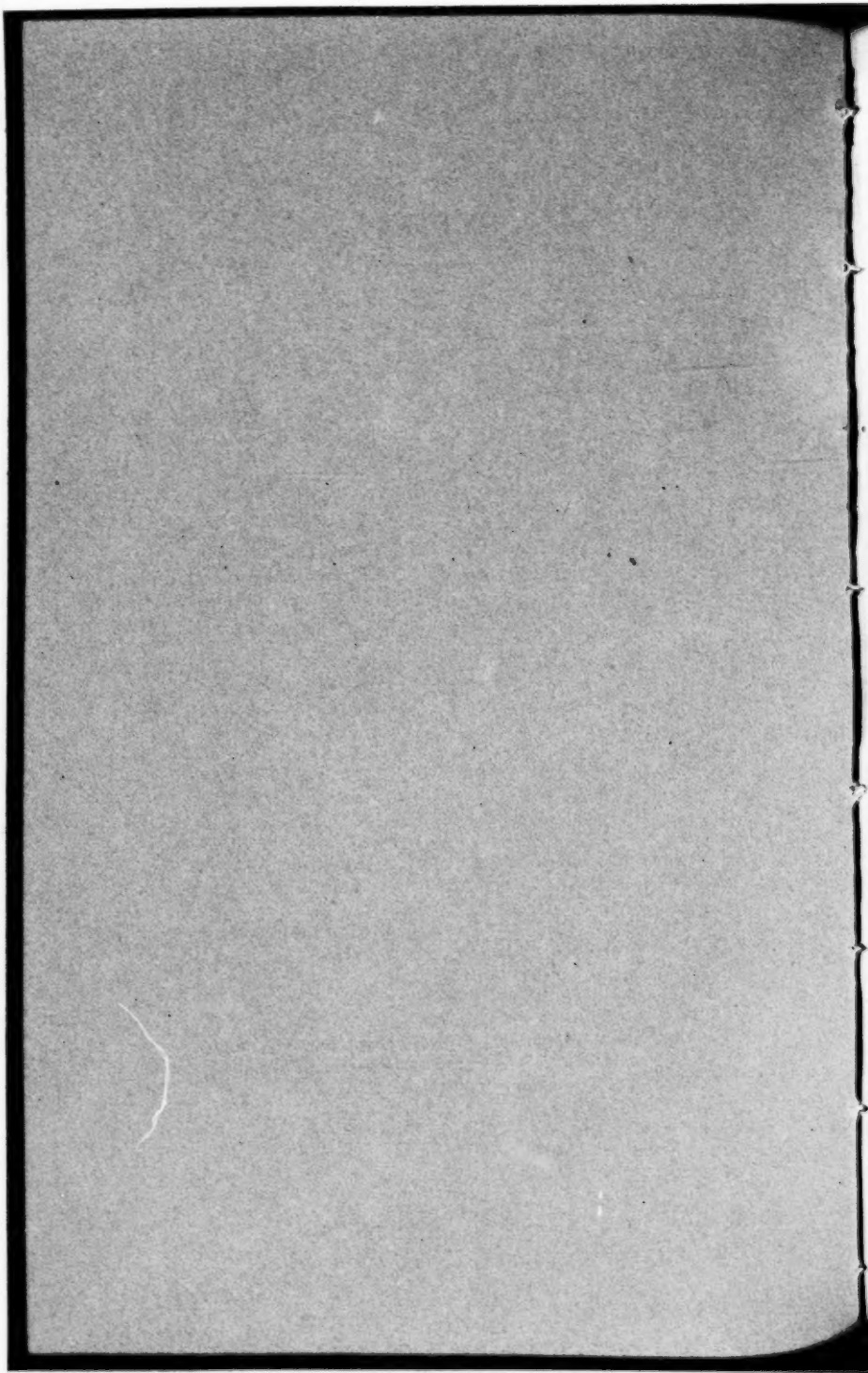
CLAUDE BOWERS ET AL., PETITIONERS

v.

REMINGTON RAND, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION



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CITATIONS

734712—47——1

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OPINIONS BELOW

The findings of fact and conclusions of law of the District Court of the Southern District of Illinois, Southern Division (R. 82–92) are reported at 64 F. Supp. 620.[1] The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 113–116) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on December 10, 1946 (R. 117). The petition for a writ of certiorari

[1] The district judge delivered an oral opinion which appears in the record at pp. 74–81.

was filed on February 7, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioners, firemen employed at an ordnance plant under a two-platoon work schedule which was established, with the consent of such firemen, by contract subject to the prior approval of the Wage and Hour Administrator and which included duty time and sleeping time, can recover premium pay, liquidated damages and attorneys fees under the Fair Labor Standards Act for such sleeping time where both courts below have held, on all the facts and circumstances of the case, that such time was noncompensable resting time.

STATUTE INVOLVED

The Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 *et seq.*, provides in pertinent part:

> SEC. 7 (a). No employer shall, * * *, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *
>
> (3) for a workweek longer than forty hours * * *
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

At all times material to the instant action respondent operated the Sangamon Ordnance Plant at Illiopolis, Illinois for the United States Army (R. 82);[2] petitioners were employed at this plant as firemen (R. 3, 10, 20, 28). Prior to February 7, 1944, the plant fire department had been operated on a three-shift basis whereby each shift worked eight hours a day, six days a week (R. 34, 43, 49, 82). On that date, a two-platoon system was put into operation (R. 82). Under this system, the work week was divided into two alternate shifts of twenty-four consecutive hours each (R. 83). Each fireman normally worked seven such shifts in each two weeks of employment (R. 84). Compensation was based on the sixteen hour period (8:30 A. M. to 12:30 A. M.) during which the firemen were on duty (R. 83). No compensation was paid for the balance of the period, the "sleeping shift" (12:30 A. M. to

[2] Respondent is a "cost-plus contractor" who has entered into a contract with the War Department, pursuant to which the contracting agency, or the United States, is or may be obligated to reimburse the contractor for money paid in resisting or settling claims arising out of work performed under the contract. Defense of this action was undertaken by the Department of Justice at the request of the War Department. Respondent offered in evidence the cost-plus contracts with the War Department under which it operated this plant. The trial court sustained petitioner's objection to their receipt. (R. 55.)

8:30 A. M.), during which they were free to sleep in company-provided facilities (R. 83).[3]

The Army Ordnance Department had instructed respondent that the two-platoon system would be used only if approved by two-thirds of the plant firemen (R. 58).[4] In accordance with this instruction, respondent, in October, 1943, had submitted the two-platoon proposal to the plant firemen for their approval (R. 58, 82, 83). Ninety-five of the 122 plant firemen then employed approved the use of the system (R. 58). All but three petitioners who were then employed as firemen[5] voluntarily approved and consented to the institution of the two-platoon system. The three petitioners who failed to approve the plan continued to work in the fire department at their own request after the inauguration of the plan, and the remaining nonsigners, who did not desire to work under the two-platoon system, were offered other assignments in the plant (R. 58). The overwhelming

[3] If called upon to perform emergency fire fighting duties during the "sleeping shift," premium compensation was paid to petitioners (R. 87–88). There is no question here as to such calls.

[4] It should be noted that the trial judge herein refused to receive evidence to show that the two-platoon system was originally suggested by the War Department (R. 56; cf. record in *Bell* v. *Porter*, No. 993, this Term, at p. 374, where such evidence was received). The origin of the system as a method of meeting the manpower shortage is described in *Bridgeman* v. *Ford, Bacon & Davis*, 64 F. Supp. 1006, 1008 (E. D. Ark.).

[5] Fifteen of the petitioners were employed as firemen after the institution of the two-platoon system (R. 51).

preponderance of testimony shows that no employer pressure was exerted to obtain approval of the plan (R. 37, 44, 51–52, 58, 59, 65, 87). The only witness, a petitioner herein, who testified that there was such pressure (R. 50) admitted that he was in favor of its adoption (R. 49).

The contract which embodied the two-platoon system provided (R. 70, 83):

> 1. The regularly scheduled shift consists of 24 consecutive hours. Each employee is granted a rest period of 8 consecutive hours during each shift and is on duty the remaining 16 hours. Employees are given 24 consecutive hours off between shifts.
>
> 2. During the entire shift employees must remain within the plan area where sleeping facilities are provided for their use during rest periods.
>
> 3. Employees in the job classification of "Fireman" are paid only for the hours they are on duty on a shift (including reasonable time for meals during their 16 hour tour of duty) and are paid one and one-half times their basic hourly rate for all time they are on duty in excess of 40 hours in one work week. If during any shift, an employee is required, due to an emergency, to be on duty during all or any part of his regularly scheduled rest period, he is compensated for such time at one and one-half times his basic hourly rate.

The trial court found that respondent complied in full with these terms of the contract of em-

ployment with petitioners (R. 87).[6] During the sixteen hour paid period from 8:30 A. M. to 12:30 A. M. the men cleaned the stations, the equipment and their quarters; attended classes; participated in drills and special assignments (R. 35, 39, 61, 63–64, 84–85). Fire calls were few (R. 64–65), and petitioners spent on the average six or seven of their sixteen paid hours in active work (R. 65). The remainder of the time they were free to relax, play cards, listen to the radio and to engage in other pleasurable pursuits (R. 35, 39, 62, 65, 67).

It was customary for the firemen to retire before 12:00 o'clock midnight (R. 67, 85), and ample opportunity was accorded them for eight

[6] In addition to the requirement of approval by two-thirds of the plant firemen, the War Department required prior approval, as in compliance with the Fair Labor Standards Act, by the Administrator of the Wage and Hour Division of the two-platoon system for firemen to be employed at ordnance plants (R. 70, 83). The contract here involved provided for such approval (R. 70, 83). See *Bridgeman* v. *Ford, Bacon & Davis*, *supra*, p. 1008. However, the trial court refused to admit a letter opinion of the Wage and Hour Administrator approving the method of compensation provided for in the use of the two-platoon system herein as in compliance with the Fair Labor Standards Act on the ground that it was merely "someone's opinion as to the ultimate question to be determined in this case" (Deft. Ex. VI, R. 53). In the instant action, as was customary, the War Department obtained the specific approval of the Wage and Hour Administrator prior to the inauguration of the two-platoon system. See *Rokey* v. *Day & Zimmermann*, No. 994, this Term, record pp. 117–122 (C. C. A. 8); *Bridgeman* v. *Ford, Bacon & Davis*, 64 F. Supp. 1006, 1008 (E. D. Ark.).

hours uninterrupted sleep (R. 48, 61, 85). Living conditions provided by respondents for petitioners' use, including cooking facilities and utensils, bathing and toilet facilities, sleeping accommodations, bedding and laundry service, were fully adequate to the requirements of petitioners in this respect (R. 86). Although petitioners were subject to call during their sleeping period, the calls were infrequent, averaging approximately one hour out of every 700 hours of sleeping time (R. 86). Full payment was made for all such calls (R. 43, 87–88). Occasionally petitioners were assigned to the telephone watch during the period from 12:30 A. M. to 8:30 A. M. The trial court found that no fireman who was assigned this watch after the inauguration of the two-platoon system, failed to take or was prevented from taking free from all other duties a consecutive period of eight hours for sleeping at some other time during the preceding sixteen hours (R. 86).[7] In addition petitioners assert that they spent between one-half to three-quarters of an hour of their rest period in the performance of certain miscellane-

[7] Prior to October 2, 1944, the men at each station were permitted to divide the night telephone watch according to their own desires by arrangment with their captains (R. 57, 62, 63). Subsequent to that date the fire captains were directed to divide this watch on an eight hour basis and to assign the men on the watch an equivalent consecutive eight hour period for sleep during the sixteen hours preceding the commencement of his watch (R. 62, 63, 71–73). This was done thereafter (R. 64, 73).

ous tasks (R. 35). These "tasks" included the eating of breakfast prior to going off duty, which was merely a matter of personal choice, and the storage of their bed clothing and personal gear (R. 61). The latter required no more than five minutes of work (R. 66) and in any event did not prevent petitioners from having eight hours for uninterrupted sleep (R. 38, 67, 87).

The instant action was brought on the theory that, under the two-platoon system, the entire rest period from 12:30 A. M. to 8:30 A. M. was working time and hence compensable under the Fair Labor Standards Act (R. 2–5). The district court recognized that sleeping time might, in a proper case, constitute working time under the Act but held, contrary to petitioners' contention, that it was not conclusively shown to be working time by the mere fact that the employees were required to spend their "sleeping shift" on the premises (R. 89). Following *Skidmore* v. *Swift & Co.*, 323 U. S. 134, and *Armour & Co.* v. *Wantock*, 323 U. S. 126 (R. 77–81), the district court held that, on all the facts and circumstances of the case, including the contract freely entered into and fairly understood, petitioners' rest periods did not constitute compensable working time under the Act (R. 90–92). Accordingly, it entered judgment for respondent (R. 92). Upon appeal, the court below affirmed on the ground that the facts of the case showed that, under the two-platoon system, petitioners were waiting to be engaged during the

"sleeping shift" and that hence time spent in sleeping was not compensable (R. 116).

ARGUMENT

The instant case presents substantially the same narrow factual question that is raised by the companion cases, *Rokey* v. *Day & Zimmermann, Inc.*, No. 994, and *Bell* v. *Porter,* No. 993 and one, we submit, that has been correctly determined in accordance with controlling decisions of this Court by both courts below. *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local,* 321 U. S. 590, 605. We further submit that, contrary to the suggestion of petitioners in the *Bell* case, by reference made applicable herein (Pet. 7), no new question of importance requiring decision by this Court is presented.

1. The instant case, and the companion cases, *Rokey* v. *Day & Zimmermann, supra,* and *Bell* v. *Porter, supra,* are governed by the principle of *Skidmore* v. *Swift & Co., supra,* wherein this Court held that whether or not waiting time was working time under the Act is "a question of fact to be resolved by appropriate findings of the trial court,"[8] and, at least by implication, ap-

[8] The trial court was admonished to consider the agreement between the parties, the parties' practical construction of their agreement as exemplified by their conduct and the surrounding circumstances, interpretations and opinions of the Wage and Hour Administrator, and the nature of the service and its relation to waiting time (323 U. S. at pp 136–137). See Interpretative Bulletin No. 13 (1940 Rev.), pars. 6–7, Wage and Hour Division, United States Department of Labor.

proved the Wage and Hour Administrator's position that sleeping time was not to be treated as working time. Applying this test, the trial court in the instant action made appropriate findings and concluded that petitioners' sleeping time was not working time and hence not compensable. It was found that petitioners had agreed to be compensated for sixteen of the twenty-four hours spent on respondent's premises, thus excluding the eight hour rest periods from the compensable work week, except that petitioners were compensated at premium rates for emergency calls during such rest period (R. 83, 87). Petitioners accepted this plan in consideration of their employment as firemen (R. 80, 116). That this agreement constituted a reasonable computation of petitioners' working time (e. g. *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local,* 321 U. S. 590, 603; *Jewell Ridge Corporation* v. *Local,* 325 U. S. 161, 169, 170) is supported by the views of the Administrator of the Wage and Hour Division, United States Department of Labor, which, the *Skidmore* case indicated, was to be given considerable weight on this very question, as well as by the parties' practical construction of their agreement as exemplified by their conduct and the surrounding circumstances.[9]

[9] See note 8, *supra*, and the brief filed on behalf of the Administrator in the *Skidmore* case as summarized in the opinion (323 U. S. at 139).

Thus, petitioners normally completed their active work by 11:00 A. M. (R. 84–85) and the balance of the period for which they were paid was spent in eating and recreational activities (R. 84, 85). Petitioners were furnished adequate living and sleeping quarters (R. 86) and their regular sleep was very rarely interrupted (R. 86). These findings, together with evidence that certain of the petitioners worked in respondent's plant as material handlers on their "off" days (R. 43, 66) and that others lived in the plant dormitories during the workweek at their own expense both before and after the institution of the two-platoon system because of commuting difficulties (R. 37, 39), give adequate support to the trial court's conclusion that petitioners' sleeping time—a purely private pursuit which would presumably occupy their time whether or not they were on the employer's premises—was spent predominantly for their own benefit (R. 90). Cf. *Walling* v. *Portland Terminal Co.,* No. 336, this Term, decided February 17, 1947. Petitioners' contention in the *Bell* case, by reference made applicable to the instant action (Pet. 7), that the time spent in sleeping was primarily for the employer's benefit (Pet. in *Bell* v. *Porter,* No. 995, pp. 9–12) and therefore compensable, is thus not only inconsistent with the clear weight of the evidence, but also with the judgments of the two courts below based on find-

ings with ample evidence to warrant such findings.[11]

2. Petitioners content that the courts below have misconstrued the *Skidmore* case in that undue emphasis was placed upon the agreement between the parties; that this agreement cannot be given the effect of a contract to settle doubtful issues as to activity or non-activity to be included in work (e. g., *Tennessee Coal Co.* v. *Muscoda Local, supra; Jewell Ridge Corp.* v. *Local supra*); and that in any event this agreement was vitiated by employer pressure exerted to obtain its acceptance (Pet. 7–8). There is no merit to these arguments for the following reasons:

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[11] We perceive no merit to the contention of petitioners in the *Bell* case that the decisions of the Circuit Court of Appeals for the Seventh Circuit in that action and in the instant case, and the decision of the Circuit Court of Appeals for the Eighth Circuit in the *Rokey* case are in conflict with *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. 2d 359 (C. C. A. 10), certiorari denied, 320 U. S. 772 (Pet. *Bell* v. *Porter*, No. 993, p. 12). That case involved a contract of employment which provided for the fixed monthly salary for a specified number of hours worked per week without allocating the compensation to statutory workweek and overtime. Nowhere does it appear that the principles involved in the instant action were considered by that court. Equally without merit is those petitioners' contention that there is a conflict with *Whitsitt* v. *Enid Ice and Fuel Co.*, 5 W. H. Rpt. 636 (W. D. Okla.). While there is a dictum to the effect that an employer cannot escape liability for overtime compensation on the ground that a watchman was free to sleep in company-furnished facilities, the case held that since the employer was not engaged in the production of goods for commerce, its employees were not covered by the Fair Labor Standards Act.

First, the trial court found that the employment contract consisted of the proposed plan for the two-platoon system together with the acceptance thereof by petitioners either in writing or by their conduct [12] together with such minor modifications from time to time as were mutually agreed upon, either expressly or by implication, and that the terms of this contract had been fully complied with by respondent (R. 87). Both courts below concluded *from all the facts of the case,* including this agreement, and its practical construction by the parties as exemplified by their conduct and the surrounding circumstances, that petitioners had agreed to keep themselves available for duty if called upon during their rest period and that in consideration of their employment as firemen they were willing to sleep on respondent's premises every other night (R. 79–80, 116). This is a precise application of the principles of the *Skidmore* case.

Second, the courts below did not predicate their judgments solely on the basis of the contract of employment. They did, however, give proper effect to this contract under the principles of the *Tennessee Coal Co.* and *Jewell Ridge Corp.* cases.

[12] All but 18 of the petitioners accepted the proposed plan in writing. Three of the petitioners who voted against the plan nevertheless requested employment under the two-platoon system. Fifteen of the petitioners were employed as firemen subsequent to the institution of the two-platoon system. (Fdg. 3, R. 82.)

In the *Tennessee Coal Co.* case this Court recognized that while the parties could not validly agree that time spent primarily for the benefit of the employer was not working time, this did not foreclose reasonable provisions of contract to settle the question "in borderline cases * * * whether certain activity or non-activity constitutes work or employment" (321 U. S. at p. 603). This distinction was reiterated in the *Jewell Ridge Corp,* case (325 U. S. at pp. 169–70). It is apparent that the contract in the instant case falls squarely within this rule. Not only was the time spent asleep a purely private pursuit, and hence not primarily for the employer's benefit, but also there is no precise statutory definition of work or employment in the Fair Labor Standards Act to guide in the determination of the question whether petitioners' sleeping time was working time.[13] Third, contrary to petitioners' contention (Pet. 8), the overwhelming weight of evidence clearly showed that no employer coercion was exerted to obtain acceptance of this agreement (R. 37, 44, 51–52, 58, 59, 65).[14]

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[13] There is nothing in the legislative history of the Act indicative of the intent of Congress. See H. Rep. 1452, 75th Cong., 1st Sess.; H. Rep. 2182, 75th Cong., 3d Sess.; S. Rep. 884, 75th Cong., 1st Sess.

[14] It is significant that the only petitioner who testified that there was such pressure (R. 50) admitted that he was in favor of the two-platoon system (R. 49). More significant, and the complete answer to petitioners' contention that men refusing to agree to the two-platoon system would

3. Petitioners contend that review by this Court is necessary herein to aid in the administration of a considerable body of federal litigation (Pet. 7; Pet. in No. 993, 17). In support of this contention, reference is made to information from the Department of Justice that there have been approximately 25 similar suits. A further check of the files reveals that there have been 22 such suits. The Government's position herein has been sustained by the Circuit Courts of Appeals in the Seventh and Eighth Circuits in this and its companion cases, and by three federal district courts.[15] None of the remaining 16 cases have gone to judgment. There is no reason to assume that the presently controlling decisions of this Court will not furnish adequate guides to the lower courts in their disposition of these pending cases, as they have in the disposition of the six decided cases.

CONCLUSION

The decision of the court below was clearly correct and there is no conflict. We respectfully

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be fired (Pet. 8) is the fact that three petitioners who did not agree to the plan requested and were employed thereunder, and that the remainder of the firemen who were not in favor of its adoption were offered other employment by respondent (R. 82–83).

[15] *Bridgeman* v. *Ford, Bacon & Davis*, 64 F. Supp. 1006 (E. D. Ark.); *Curlee* v. *National Gypsum Co.* (W. D. Tex., Waco Div.) No. 562 Civ., decided November 12, 1946 (not yet officially reported); *Eustice* v. *Federal Cartridge Corp.*, 66 F. Supp. 55 (D. Minn.).

submit that the petition for a writ of certiorari be denied.

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